

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Hewlett-Packard Co. (“Defendant” or “HP”) moves to dismiss Plaintiff David Elias’s Second Amended Complaint based on Federal Rules of Civil Procedure 12(b)(6) and 9(b). The Court found the motion to be appropriate for disposition without oral argument pursuant to Civil Local Rule 7-1(b), and vacated the hearing set for May 9, 2013. Having considered the submissions of the parties and the relevant law, the Court hereby GRANTS-IN-PART and DENIES-IN-PART Defendant’s Motion to Dismiss.

I. BACKGROUND

A. Factual Allegations

1 Plaintiff alleges that, on or about June 10, 2010, he purchased an HP Pavilion Slimline
2 s5305z computer through HP's website. Second Am. Compl. ("SAC") ¶ 30, ECF No. 29.
3 Plaintiff opted to include a "recommended" graphics card, which HP marketed and advertised as a
4 "faster, higher performance, more powerful and/or upgraded" computer component. SAC ¶¶ 16,
5 30. Although Advanced Micro Devices ("AMD")—the manufacturer of the graphics card that HP
6 offered and that Plaintiff selected—expressly recommended a 300-watt or greater power supply for
7 the specific graphics card that Plaintiff selected, Plaintiff's Slimline computer was equipped with
8 only a 220-watt power supply. SAC ¶¶ 2, 31, 32. HP neither informed Plaintiff that AMD
9 recommended a greater power supply than what was included with the Slimline computer, nor
10 afforded Plaintiff the option of upgrading his computer's 220-watt power supply unit at the time of
11 purchase. SAC ¶ 31. Further, at no time did HP inform Plaintiff that purchasing the graphics card
12 with the Slimline's standard 220-watt power supply would decrease the computer's performance,
13 efficiency, and life-span, and increase its safety hazards, including the risk of catching fire. SAC
14 ¶ 32.

15 In the months following the Slimline purchase, but "well before the end of the first year of
16 ownership," Plaintiff's computer began to "randomly freeze, restart, or shut down." SAC ¶ 33.
17 Approximately 17 months after purchasing his computer, the computer "shorted out," "melted,"
18 and was damaged beyond repair. SAC ¶¶ 3, 33. Plaintiff then learned that the wattage rating of the
19 included power supply was well below what was needed or recommended to run the computer
20 configuration that he selected through the HP website at the time of purchase, and that the
21 inadequacy of the power supply caused his computer problems. SAC ¶ 33. Plaintiff contacted HP
22 for assistance, but HP "would not replace the computer or even agree to repair it." SAC ¶ 33.

23 Plaintiff now seeks to represent a nationwide class including any person who, between
24 December 7, 2007, and the present, "purchased . . . a computer, directly from Defendant, with an
25 included power supply unit having a rated capacity lower than (1) the total combined wattage of all
26 internal PC components and peripherals or (2) the capacity recommended by the manufacturer of
27 any included component or peripheral." SAC ¶ 34.

1 **B. Procedural History**

2 Plaintiff filed a putative class action complaint against Defendant in the Santa Clara County
3 Superior Court on December 9, 2011, ECF No. 1-2, and subsequently filed his First Amended
4 Complaint (“FAC”) on December 22, 2011, ECF No. 1-3. HP removed the case to this Court on
5 January 26, 2012. ECF No. 1. The case was assigned to the undersigned judge on January 31,
6 2012. ECF No. 7. HP then filed a Motion to Dismiss Plaintiff’s First Amended Complaint based
7 on Federal Rules of Civil Procedure 12(b)(6) and 9(b). Mot. to Dismiss Pl.’s FAC, ECF No. 11.
8 On October 11, 2012, this Court granted Defendant’s Motion to Dismiss the FAC with leave to
9 amend. *See Order Granting Mot. to Dismiss (“Order”), ECF No. 26.*

10 On October 22, 2012, Plaintiff filed a Second Amended Complaint. ECF No. 29.
11 Plaintiff’s Second Amended Complaint narrows the proposed class to only those people who, like
12 Plaintiff, customized and purchased their computers directly through HP’s website, rather than
13 purchasing them from a third-party retailer, and sets forth additional factual allegations to support
14 his claims for relief. *See Opp’n at 1.*

15 On November 6, 2012, HP filed a Motion to Dismiss Plaintiff’s Second Amended
16 Complaint. *See Mot. to Dismiss Pl.’s SAC. (“Mot.”), ECF No. 30.* HP contends that none of
17 Plaintiff’s changes or new allegations serve to cure the deficiencies identified by the Court
18 previously. *Id.* at 2. Plaintiff filed a timely opposition to HP’s second Motion to Dismiss, *see* Pl.’s
19 Opp. to Def.’s Mot. to Dismiss Pl.’s SAC (“Opp’n”), ECF No. 31, to which HP filed a reply, *see*
20 Def.’s Reply Supp. Mot. to Dismiss P1.’s SAC (“Reply”), ECF No. 32.

21 **II. LEGAL STANDARDS**

22 **A. Rule 12(b)(6)**

23 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an
24 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*
25 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the
26 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
27 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a

1 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
2 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). For purposes
3 of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as
4 true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek*
5 *v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

6 However, a court need not accept as true allegations contradicted by judicially noticeable
7 facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and a “court may look beyond
8 the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6) motion
9 into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor is a
10 court required to “assume the truth of legal conclusions merely because they are cast in the form
11 of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam)
12 (quoting *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere “conclusory
13 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.”
14 *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678.
15 Furthermore, “a plaintiff may plead [him]self out of court” if he “plead[s] facts which establish that
16 he cannot prevail on his . . . claim.” *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.
17 1997) (internal quotation marks and citation omitted).

18 **B. Rule 9(b)**

19 Claims sounding in fraud or mistake are subject to the heightened pleading requirements of
20 Federal Rule of Civil Procedure 9(b), which require that a plaintiff alleging fraud “must state with
21 particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b); *see Kearns v. Ford Motor*
22 *Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy the heightened standard under Rule 9(b), the
23 allegations must be “specific enough to give defendants notice of the particular misconduct which
24 is alleged to constitute the fraud charged so that they can defend against the charge and not just
25 deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.
26 1985). Thus, claims sounding in fraud must allege “an account of the time, place, and specific
27 content of the false representations as well as the identities of the parties to the misrepresentations.”

1 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (internal quotation marks
2 and citation omitted). A plaintiff must set forth what is false or misleading about a statement, and
3 why it is false.” *In re GlenFed, Inc. Securities Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc),
4 superseded by statute on other grounds as stated in *Marksman Partners, L.P. v. Chantal*
5 *Pharmaceutical Corp.*, 927 F. Supp. 1297, 1309 (C.D. Cal. 1996).

6 **C. Leave to Amend**

7 If a court determines that a complaint should be dismissed, it must then decide whether to
8 grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend
9 “shall be freely given when justice so requires,” bearing in mind “the underlying purpose of Rule
10 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities.” *Lopez*
11 *v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks and citation
12 omitted). Nonetheless, a court “may exercise its discretion to deny leave to amend due to ‘undue
13 delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by
14 amendments previously allowed, undue prejudice to the opposing party. . . [and] futility of
15 amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010)
16 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (alterations in original).

17 **III. DISCUSSION**

18 Plaintiff’s Second Amended Complaint raises six causes of action: (1) violation of the
19 Consumers Legal Remedies Act (“CLRA”), California Civil Code §§ 1750, *et seq.*; (2) violation of
20 California’s False Advertising Law (“FAL”), California Business and Professions Code §§ 17500,
21 *et seq.*; (3) fraud; (4) breach of express warranty pursuant to California Commercial Code §§ 2100,
22 *et seq.*; (5) violation of the Song-Beverly Consumer Warranty Act, Civil Code §§ 1790, *et seq.*; and
23 (6) violation of California’s Unfair Competition Law (“UCL”), California Business and
24 Professions Code §§ 17200, *et seq.* The Court first addresses Plaintiff’s breach of warranty claims,
25 then addresses Plaintiff’s claims sounding in fraud, and finally addresses Plaintiff’s remaining
26 UCL claims.

27 **A. Breach of Warranty Claims**

1 **1. Breach of Express Warranty**

2 HP's written warranty states, in pertinent part, that, "HP warrants that the HP Hardware
3 Products that you have purchased or leased from HP are free from defects in materials or
4 workmanship under normal use during the Limited Warranty Period [of one year]." SAC ¶ 78.
5 Plaintiff's fourth cause of action alleges that HP breached its express warranty by "selling
6 computers with insufficient power supplies" which "could not and would not function properly
7 under normal use, within the first year of operation." SAC ¶ 81. HP argues that Plaintiff's breach
8 of warranty claim must fail as a matter of law because Plaintiff's computer functioned properly
9 throughout the one-year period and beyond. Reply at 2.

10 An express warranty is "a contractual promise from the seller that the goods conform to the
11 promise. If they do not, the buyer is entitled to recover the difference between the value of the
12 goods accepted by the buyer and the value of the goods had they been as warranted." *Daugherty v.*
13 *Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 830 (2006) (modified) (citing Cal. U. Com. Code
14 §§ 2313(a) & 2714(2)). Proof of reliance on specific promises is not required. *Weinstat v.*
15 *Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1227 (2010).

16 In the Court's October 11, 2012 Order granting HP's Motion to Dismiss the FAC, the Court
17 found that Plaintiff failed to state a claim for breach of express warranty because Plaintiff "[did]
18 not allege any facts regarding the likelihood that the [claimed defect] would lead to malfunction
19 [within the one year warranty period]." Order at 9; see *Daugherty*, 144 Cal. App. 4th at 830 ("The
20 general rule is that an express warranty does not cover repairs made after the applicable time . . .
21 period[] ha[s] elapsed.") (internal quotation marks and citation omitted). In addition, the Court
22 expressed doubt about whether latent defects in consumer products with limited lifespans, such as
23 computers, could give rise to breach of warranty claims. See Order at 8-9 (distinguishing cases
24 involving electronics from *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 918
25 (2001), which involved defects in the foundations of plaintiffs' presumably long-lasting houses,
26 and held that "proof of breach of warranty does not require proof the product has malfunctioned
27 but only that it contains an inherent defect which is substantially certain to result in malfunction

1 during the useful life of the product.”). The Court further found that, even if *Hicks* were applicable
2 to the computers at issue in this case, Plaintiff’s Complaint failed to sufficiently allege an inherent
3 defect that was “substantially certain” to result in malfunction. Order at 9.

4 Plaintiff’s Second Amended Complaint attempts to cure these deficiencies. First, Plaintiff
5 specifically alleges that the defects in his computer manifested during the one-year warranty
6 period. According to Plaintiff, “Defendants’ computers, given their inadequate power supplies,
7 could not and would not function properly under normal use, *within the first year of operation*.
8 Rather, they would (and in Plaintiff’s case, did) randomly freeze, restart, and shut down during that
9 period.” SAC ¶ 81 (emphasis added); *cf. Daugherty*, 144 Cal. App. 4th at 830 (finding that
10 plaintiff failed to state a claim for breach of express warranty where it was “undisputed” that the
11 defect alleged did not cause any malfunction within the warranty period).

12 Second, Plaintiff adds factual allegations to the SAC to show why the computer
13 malfunctions he identified were not “regular occurrences when troubleshooting computers,” *cf.*
14 Order at 11, but rather defects caused by the inadequate power supply. Specifically, Plaintiff
15 contends that the use of inadequate power supplies with the computers at issue in this case “means
16 that the power supply unit will be running at its maximum capacity for long periods of time,
17 generating substantial heat, putting undue stress on, and leading to premature failure of, cooling
18 fans and the power supply unit itself.” SAC ¶ 2. Consequently, Plaintiff contends that Defendant’s
19 computers—including his own—suffered from problems “that would not otherwise occur,”
20 including “failing to boot, freezing, and randomly restarting.” *Id.* In further support of this
21 position, Plaintiff cites to the Advanced Micro Devices website,¹ which lists the problems cited by
22 Plaintiff as direct results of a “defective or inadequate power supply.” *Id.* (stating that a defective
23 or inadequate power supply can cause the system to experience performance and system instability,
24 including “random reboots or hangs” and “[r]andom application crashes or hangs” as well as
25

26 ¹ According to Plaintiff, Advanced Micro Devices “supplies a substantial percentage of the
27 processors incorporated into Defendant’s computers (including the ones incorporated in the
computer Defendant sold to Plaintiff).” SAC ¶ 2.

1 display corruption and abnormality). Plaintiff's SAC also includes specific allegations explaining
2 why the wattage difference between the power supply provided with HP's computers and the
3 power supply needed for the graphics card are more likely to lead to malfunction. *See, e.g.*, SAC
4 ¶ 3 (alleging that "an overloaded or overheated power supply is more likely to send voltage surges
5 through the computer").

6 For purposes of this Motion, the Court finds that Plaintiff has sufficiently alleged facts
7 which, if true, may demonstrate that HP breached its express warranty. Plaintiff has alleged facts
8 that the power supply in his computer was insufficient for the computer's components, that the
9 insufficiency was likely to result in malfunctions beyond what could be considered normal
10 troubleshooting, and that Plaintiff actually experienced these issues during the express warranty
11 period. Thus, the Court finds that Plaintiff's amended allegations are sufficient to survive a motion
12 to dismiss. Accordingly, Defendant's Motion to Dismiss Plaintiff's fourth cause of action is
13 DENIED.

14 **2. Song-Beverly Consumer Warranty Act**

15 Plaintiff's fifth cause of action is that HP's sale of the computers at issue violates the Song-
16 Beverly Consumer Warranty Act, which provides that "every sale of consumer goods that are sold
17 at retail in [California] shall be accompanied by the manufacturer's and the retail seller's implied
18 warranty that the goods are merchantable." Cal. Civ. Code § 1792. By its terms, the Song-Beverly
19 Act applies only to goods sold in California. *Id.* To be merchantable, consumer goods must: "(1)
20 [p]ass without objection in the trade under the contract description[;]" (2) [be] fit for the ordinary
21 purposes for which such goods are used[;]" (3) [be] adequately contained, packaged, and labeled[;
22 and] (4) [c]onform to the promises or affirmations of fact made on the container or label." Cal.
23 Civ. Code § 1791.1(a). The implied warranty "is coextensive in duration with an express warranty
24 which accompanies the consumer goods," but "in no event shall such implied warranty have a
25 duration of less than 60 days nor more than one year following the sale of new consumer goods to
26 a retail buyer." Cal. Civ. Code § 1791.1(c).

1 The implied warranty of merchantability does not “impose a general requirement that goods
2 precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of
3 quality.” *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1296 (1995) (internal
4 quotation marks and citation omitted). “The core test of merchantability is fitness for the ordinary
5 purpose for which such goods are used.” *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297, 1303
6 (2009) (quoting *Isip v. Mercedes-Benz USA, LLC*, 155 Cal. App. 4th 19, 26 (2007)). “Such fitness
7 is shown if the product is in safe condition and substantially free of defects[.]” *Id.* (internal
8 quotation marks and citations omitted).

9 HP argues that the Song-Beverly Act does not apply to Plaintiff because his computer
10 malfunctioned seventeen months after its sale, which is beyond the one-year maximum duration set
11 forth in Section 1791.1(c). Mot. at 7. Plaintiff responds by arguing that the Second Amended
12 Complaint alleges facts which demonstrate that, “[i]n the months following the computer purchase,
13 and well before the end of the first year of ownership, Plaintiff’s computer began to randomly
14 freeze, restart, or shut down,” and that these problems rendered the computer unfit for its ordinary
15 use. Opp’n at 13 (citing SAC ¶¶27, 33, 81); *see also* SAC ¶ 91. HP disputes that these
16 malfunctions are anything other than routine. Reply at 4. While the Court expresses some
17 skepticism that Plaintiff’s random shutdowns and reboots were so pervasive or problematic as to
18 render his computer “unfit for its ordinary purpose,” the Court finds that, as described in the
19 previous section, Plaintiff’s additional factual allegations are sufficient to state a claim for relief for
20 purposes of a motion to dismiss.

21 HP argues further that Plaintiff’s Song-Beverly Act claim fails because Plaintiff did not
22 present the product to an authorized representative of HP during the one-year warranty period.
23 Specifically, HP cites to *Gonzalez v. Drew Indus.*, 750 F. Supp. 2d 1061 (C.D. Cal. 2007), for the
24 proposition that, to fall within the protections of the Song-Beverly Act, Plaintiff must have
25 provided notice of the alleged warranty claim to HP within the warranty period. Mot. at 7; Reply
26 at 5. However, *Gonzalez* contains no clear statement to this effect. *See Gonzalez*, 750 F. Supp. 2d
27 at 1073 (finding that notice was sufficient under the Song-Beverly Act where plaintiff provided

1 notice to defendant on the same date of filing the original complaint, which was fifty days prior to
2 adding the Song-Beverly Act claim to the first amended complaint). As noted in *Mexia*, “[t]here is
3 nothing that suggests a requirement that the purchaser discover and report to the seller a latent
4 defect within . . . [the duration of the express warranty]” in order bring a claim under the Song-
5 Beverly Act. *Mexia*, 174 Cal. App. 4th at 1310; cf. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 931-
6 32 (9th Cir. 2011) (“To avoid dismissal of a breach of contract or breach of warranty claim in
7 California, ‘[a] buyer must plead that notice of the alleged breach was provided to the seller within
8 a reasonable time after discovery of the breach.’”) (quoting *Stearns v. Select Comfort Retail Corp.*,
9 763 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010)).

10 Here, Plaintiff alleges that while the malfunctions took place during the warranty period,
11 the source of the malfunction—the insufficient power supply—was not discovered until the
12 Plaintiff’s computer short-circuited after 17 months of ownership. SAC ¶ 33. At the time of
13 discovery, Plaintiff contacted HP regarding the alleged breach of warranty. *Id.* Plaintiff therefore
14 provided sufficient notice of breach so as to allow HP “to cure the breach and thereby avoid the
15 necessity of litigating the matter in court.” *Alvarez*, 656 F.3d at 932. Thus, at the motion to
16 dismiss stage, Plaintiff appears to have provided notice to HP of the alleged warranty violation
17 within a reasonable time after discovering the reason for the breach. Accordingly, Defendant’s
18 Motion to Dismiss Plaintiff’s fifth cause of action is DENIED.

19 **B. Fraud-Based Claims**

20 Plaintiff’s first, second, third, and sixth causes of action sound in fraud and are therefore all
21 subject to the heightened pleading requirement of Rule 9(b) of the Federal Rules of Civil
22 Procedure. *See Kearns*, 567 F.3d at 1125 (“[W]e have specifically ruled that Rule 9(b)’s
23 heightened pleading standards apply to claims for violations of the CLRA and UCL.”). These
24 causes of action are: (1) violation of the CLRA; (2) violation of the FAL; (3) fraud; and (6)
25 violation of the fraudulent prong of the UCL.

26 The CLRA prohibits ““unfair methods of competition and unfair or deceptive acts or
27 practices’ in transactions for the sale or lease of goods to consumers.” *Daugherty*, 144 Cal. App.
28

1 4th at 833 (citing Cal. Civ. Code § 1770(a)).² Under the CLRA, sellers can be liable for “making
2 affirmative misrepresentations as well as for failing to disclose defects in a product.” *Baba v.*
3 *Hewlett-Packard Co.*, No. 09-05946, 2010 WL 2486353, *3 (N.D. Cal. June 16, 2010). “Conduct
4 that is ‘likely to mislead a reasonable consumer’ . . . violates the CLRA.” *Colgan v. Leatherman*
5 *Tool Grp., Inc.*, 135 Cal. App. 4th 663, 680 (2006) (quoting *Nagel v. Twin Laboratories, Inc.*, 109
6 Cal. App. 4th 39, 54 (2003)).

7 California’s FAL makes it unlawful for a business to disseminate any statement “which is
8 untrue or misleading, and which is known, or which by the exercise of reasonable care should be
9 known, to be untrue or misleading.” Cal. Bus. & Prof. Code § 17500. “In determining whether a
10 statement is misleading under the statute, the primary evidence in a false advertising case is the
11 advertising itself.” *Colgan*, 135 Cal. App. 4th at 679 (internal quotation marks and citation
12 omitted). Whether an advertisement is “misleading” must be judged by the effect it would have on
13 a reasonable consumer. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

14 California’s UCL provides a cause of action for business practices that are (1) unlawful, (2)
15 unfair, or (3) fraudulent. Cal. Bus. & Prof. Code § 17200. Its coverage has been described as
16 “sweeping,” and its standard for wrongful business conduct is “intentionally broad.” *In re First*
17 *Alliance Mortg. Co.*, 471 F.3d 977, 995 (9th Cir. 2006) (citing *Cel-Tech Communs., Inc. v. L.A.*
18 *Cellular Tel. Co.*, 20 Cal. 4th 163 (1999)). In order to state a cause of action under the fraud prong
19 of the UCL, “a plaintiff need not show that he or others were actually deceived or confused by the
20 conduct or business practice in question.” *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167
21 (2000). “Instead, it is only necessary to show that members of the public are likely to be
22 deceived.” *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647-48 (1996).

23

24 ² The acts and practices that Plaintiff challenges include: (1) making improper representations
25 regarding the source or certification of the goods sold, (2) making improper representations
26 regarding association with or certification by another of the goods it sold, (3) representing that its
27 goods have characteristics that they do not have, and (4) representing that its goods are of a
particular quality when they are of another. See SAC ¶ 48 (citing Cal. Civ. Code §§ 1770(a)(2),
1770(a)(3), 1770(a)(5), 1770(a)(7)).

1 The standard for all three statutes is the “reasonable consumer” test, which requires a
2 plaintiff to show that members of the public are likely to be deceived by the business practice or
3 advertising at issue. *See Williams*, 552 F.3d at 938; *see also Consumer Advocates v. Echostar*
4 *Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003) (“[U]nless [an] advertisement targets a
5 particular disadvantaged or vulnerable group, it is judged by the effect it would have on a
6 reasonable consumer.”) (internal quotation marks and citation omitted). As a result, courts often
7 analyze these three statutes together. *See, e.g., Consumer Advocates*, 113 Cal. App. 4th at 1360-62
8 (finding that certain representations about the satellite television service failed to constitute
9 “misrepresentations about the quality or characteristics of goods or false advertising in violation of
10 the CLRA, or were untrue or misleading under the False Advertising Act or the UCL, or were
11 fraudulent under the UCL”); *Tait v. BSH Home Appliances Corp.*, No. 10-00711, 2011 WL
12 3941387, *2 (C.D. Cal. Aug. 31, 2011) (analyzing UCL, FAL, and CLRA claims together based on
13 plaintiff’s theory of misrepresentation by omission).

14 In addition to Plaintiff’s CLRA, FAL, and UCL claims premised on fraud, Plaintiff brings a
15 cause of action for common law fraud. Under California law, the indispensable elements of a fraud
16 claim based on deceit include: (1) misrepresentation (such as false representation, concealment, or
17 nondisclosure); (2) knowledge of falsity; (3) intent to defraud or induce reliance; (4) justifiable
18 reliance; and (5) resulting damages. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996);
19 *Kearns*, 567 F.3d at 1126 (same).

20 Plaintiff articulates two general theories to show that Defendants’ conduct was misleading
21 and deceptive to both him and to a reasonable consumer. First, Plaintiff alleges that HP
22 “affirmatively misrepresented to the Plaintiff, and similarly situated customers, that the computers
23 would have ample power to reliably operate all upgraded components that could be chosen at the
24 time of purchase.” SAC ¶ 1. Second, Plaintiff alleges that HP fraudulently and deceptively failed
25 to disclose that, by allowing customers to upgrade their computers with higher performance
26 components, HP’s computers were underpowered and, consequently, “would necessarily [suffer

1 from] (1) [a] decrease . . . [in] performance, efficiency, life-span and (2) [an] increase i[n] safety
2 hazards, including the risk of it catching, or starting a, fire.” SAC ¶ 32.

3 **1. Affirmative Misrepresentations**

4 Plaintiff alleges that HP’s conduct was likely to deceive the public, and did in fact deceive
5 him, because HP affirmatively misrepresented that the computers at issue possessed sufficient
6 power supplies. In his FAC, Plaintiff relied on several statements made by HP’s website which
7 advertise the “ultra-reliable performance,” “full power and performance,” and “versatile, reliable
8 system” of the computers at issue. FAC ¶ 24. Similar statements are found on webpages for
9 particular product models, advertising that a product “delivers the power you need” or is “packing
10 power and style into your tightest spaces.” FAC ¶ 25. In the Court’s prior Order, the Court found
11 that these statements were merely non-actionable puffery, and that they did not rise to the level of
12 affirmative representations about a verifiable fact. *See* Order at 14-15.

13 In response to the Court’s Order, Plaintiff has added a new factual allegation in his SAC
14 that HP marketed the Slimline computers as “Compact but powerful.” SAC ¶ 24. Plaintiff alleges
15 that this statement is inherently misleading because “the small physical size [of the Slimline]
16 means there is inadequate space for either a standard-sized power supply unit or for sufficient air to
17 flow between components.” SAC ¶ 25. By upgrading the video card to obtain better graphics,
18 Plaintiff alleges that the “Slimline computers were less reliable and had shorter life spans and
19 higher safety risks.” *Id.* Plaintiff argues that all of the statements on Defendant’s purchasing
20 website, combined with the fact that HP “directly advertised and sold, to its customers, upgraded-
21 higher-powered, customizable computers and components,” makes these statements not just
22 advertising puffery, but affirmative representations that the power supply unit in the computers
23 would be sufficient for the included components. Opp’n at 16-18. Plaintiff contends that, unlike
24 his FAC, the SAC specifically ties these alleged misrepresentations to the power supply wattage
25 recommendations and thus they are factually determinable representations, and not mere puffery.
26 *Id.* at 17-18.

1 HP argues that Plaintiff's misrepresentation claim still fails despite amendment because the
2 statements about performance, power, and compact size constitute non-actionable puffery. As the
3 Ninth Circuit explained in *Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Serv., Inc.*, 911 F.2d 242 (9th Cir. 1990), “[t]he common theme that seems to run through cases
4 considering puffery in a variety of contexts is that consumer reliance will be induced by specific
5 rather than general assertions.” *Id.* at 246. Consequently, “[a]dvertising which merely states in
6 general terms that one product is superior is not actionable. However, misdescriptions of specific
7 or absolute characteristics of a product are actionable.” *Id.* (internal quotation marks and citations
8 omitted). For example, in *Consumer Advocates v. Echostar Satellite Corp.*, the California Court of
9 Appeal found that the descriptions of a satellite television system as possessing “crystal clear
10 digital” video and “CD quality” audio were non-actionable, as the representations were nothing
11 more than “boasts, all-but-meaningless superlatives,” and “claim[s] which no reasonable consumer
12 would take as anything more weighty than an advertising slogan.” *Consumer Advocates*, 113 Cal.
13 App. 4th at 1361. However, the Court of Appeal contrasted this description with further statements
14 that the system would allow consumers to receive 50 channels and to view television schedules
15 seven days in advance, finding that these latter statements were “factual representations” that were
16 sufficient to raise triable issues. *Id.*; cf. *Cook, Perkiss and Liehe, Inc.*, 911 F.2d at 246 (noting that,
17 while “an advertiser’s statement that its lamps were far brighter than any lamp ever before offered
18 for home movies” was found to be puffery, allegations of superior brightness based on statements
19 such as “35,000 candle power and 10-hour life” did support a potential Lanham Act claim)
20 (internal quotation marks and citation omitted).
21

22 The Court agrees with HP that, despite Plaintiff’s amendments to his complaint, the alleged
23 statements in the SAC still only amount to non-actionable puffery. As the Court held in its
24 previous Order, generalized advertisements that a computer is “ultra-reliable” or “packed with
25 power” say nothing about the specific characteristics or components of the computer. *See* Order at
26 15. Indeed, as discussed previously, virtually identical statements have been found to be non-
27 actionable by other courts. *See, e.g., Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973
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(N.D. Cal. 2008) (noting that statements of product superiority based on being “faster, more powerful, and more innovative,” “higher performance,” and having a “longer battery life” are “non-actionable puffery”); *see also Brothers v. Hewlett-Packard Co.*, No. 06-02254, 2006 WL 3093685, *4-5 (N.D. Cal. Oct. 31, 2006) (finding that HP’s statements about the Pavilion computer being “top of the line” and a “high-performance wireless notebook which integrates digital entertainment, photography and Internet computing into a sophisticated design with desktop comfort” constituted “non-actionable puffery in that they are nothing more than subjective statements of the superiority of the product, and are not objectively verifiable.”). Plaintiff’s addition of the “compact but powerful” advertisement does little to remedy this deficiency, as it is equally devoid of any factual assertions that are capable of being proved false.

Plaintiff’s arguments that these statements must be viewed in their totality because they were on Defendant’s website and the computers were directly sold by Defendant does little to distinguish the cases cited by the Court; the statements are all mere puffery, and the combination of several “puff” statements does not automatically create an actionable misrepresentation. *Cf. Williams*, 552 F.3d at 939 (explaining that “there are a number of features of the packaging Gerber used for its . . . product which could likely deceive a reasonable consumer”); *Peviani v. Natural Balance, Inc.*, 774 F. Supp. 2d 1066, 1072 (S.D. Cal. 2011) (reasoning that while some “statements . . . standing on their own may constitute puffery . . . [other] allegations in the complaint [appeared] to be specific rather than generalized or vague”). A reasonable consumer could not rely on these statements as describing the specific power capabilities of a HP computer.

Accordingly, Plaintiff does not sufficiently allege that HP made affirmative misrepresentations in regard to the power supplies of the computers at issue for the purpose of bringing claims under the CLRA, FAL, UCL, or for common law fraud. The Court GRANTS HP’s Motion to Dismiss these claims with prejudice.

2. Fraudulent Omissions Claims

Plaintiff also alleges that HP “fraudulently and deceptively” failed to inform him that the HP computer that he was purchasing did not include an adequate power supply to properly operate

1 the computer with the upgraded graphics card and that, as a result of the inadequate power supply,
2 “the computer would necessarily be less efficient, less powerful, under or poorly perform, have a
3 shortened life expectancy and increase the safety risks due to overheating and potentially internal
4 fires.” SAC ¶ 66.

5 For an omission to be actionable under the CLRA and UCL, “the omission must be contrary
6 to a representation actually made by the defendant, or an omission of a fact the defendant was
7 obliged to disclose.” *Daugherty*, 144 Cal. App. 4th at 835; *see also Berryman v. Merit Prop.
8 Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557 (2007) (“[A] failure to disclose a fact one has no
9 affirmative duty to disclose is [not] ‘likely to deceive’ anyone within the meaning of the UCL.”)
10 (quoting *Daugherty*, 144 Cal. App. 4th at 838).³ The California Court of Appeal has held that there
11 are four circumstances in which a duty to disclose may arise:

- 12 (1) when the defendant is the plaintiff’s fiduciary; (2) when the defendant has
13 exclusive knowledge of material facts not known or reasonably accessible to the
plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff;
14 and (4) when the defendant makes partial representations that are misleading
because some other material fact has not been disclosed.

15 *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 255-56 (2011) (modified) (citing *LiMandri v.
16 Judkins*, 52 Cal. App. 4th 326, 336 (1997)). “[A] fact is deemed ‘material,’ and obligates an
17 exclusively knowledgeable defendant to disclose it, if a ‘reasonable [consumer]’ would deem it
important in determining how to act in the transaction at issue.” *Collins*, 202 Cal. App. 4th at 256
18 (citing *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 977 (1997)).

19 In addition, in order to prevail on a common law fraudulent omission claim, a plaintiff
20 must show the following: “(1) the defendant concealed or suppressed a material fact; (2) the
21 defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant must have
22 intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the
23 plaintiff must have been unaware of the fact and would not have acted as he did if he had known of
24 the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact,

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26
27 ³ Only Plaintiff’s CLRA, UCL, and common law fraud claims appear to be predicated on HP’s
alleged fraudulent omissions. *See Opp’n at 20.*

1 the plaintiff must have sustained damage.” *Jordan v. Paul Financial, LLC*, 285 F.R.D. 435,
2 454 (N.D. Cal. 2012) (citing *Hahn v. Mirda*, 147 Cal. App. 4th 740, 748 (2007)).

3 The parties appear to agree that, when “a plaintiff’s claim is predicated on a manufacturer’s
4 failure to inform its customers of a product’s likelihood of failing *outside* the warranty period, the
5 risk posed by such asserted defect cannot be ‘merely’ the cost of the product’s repair . . . rather, for
6 the omission to be material, the failure must pose ‘safety concerns.’” *Smith v. Ford Motor Co.*, 749
7 F. Supp. 2d 980, 987 (N.D. Cal. 2010) (citing *Daugherty*, 144 Cal. App. 4th at 835-838) (emphasis
8 added); *see* Mot. at 13; Opp’n at 22. Thus, for omission-based claims outside of the warranty
9 period, “[a] manufacturer’s duty to consumers is limited to . . . [an] affirmative misrepresentation
10 or a safety issue.” *Ford Motor Co.*, 749 F. Supp. 2d at 988 (internal quotation marks and citation
11 omitted).

12 However, the parties dispute whether, under California law, an omission-based claim for
13 failures *during* the warranty period must be linked to a safety-related concern or affirmative
14 misrepresentation. *Compare* Mot. at 13, *with* Opp’n at 20-21. HP contends that, absent an
15 actionable misrepresentation, Plaintiff’s “fraudulent omissions [are] only actionable if he is able to
16 establish some kind of safety issue.” Reply at 11-12 (citing the Court’s previous Order relating to
17 post-warranty claims). Plaintiff argues that for material problems which arise during the warranty
18 period, there is no requirement that those problems be related to affirmative misrepresentations or
19 safety concerns. Opp’n at 21. In support of its argument, HP cites to *Ford Motor Co.* and *Wilson*
20 *v. Hewlett-Packard Co.*, 668 F.3d 1136 (9th Cir. 2012), among other cases. *See* Mot. at 13. In
21 *Wilson*, which involved an alleged design defect in a computer that manifested after the expiration
22 of the warranty, the Ninth Circuit stated that, “for [an] omission to be material, the failure must
23 pose ‘safety concerns.’” *See Wilson*, 668 F.3d at 1143 (citing *Ford Motor Co.*, 749 F. Supp. 2d at
24 987). However, the Ninth Circuit clarified that this requirement related only to defects arising
25 outside of the warranty period. *See id.* (distinguishing the facts in *Wilson* from *Baba v. Hewlett-*
26 *Packard Co.*, No. 09-05946, 2010 WL 2486353 (N.D. Cal. June 16, 2010), which applied a broader
27 duty to disclose, because “the defect manifested during the express warranty period”).

1 Several district court decisions agree that *Wilson* does not preclude non-safety based
2 omission claims for malfunctions during the warranty period. *See, e.g., Donohue v. Apple, Inc.*,
3 871 F. Supp. 2d 913, 926 (N.D. Cal. 2012) (distinguishing *Wilson* and its progeny, which “reject[]
4 duty to disclose claims based on product defects that manifested themselves after the expiration of
5 a manufacturer’s express warranty,” from plaintiff’s claim that the product “failed to perform as
6 expected” within warranty period); *see also Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D.
7 504, 529 (C.D. Cal. 2012) (describing the requirement that an “undisclosed defect . . . pose ‘safety
8 concerns’” as applying only if a claim based on a failure to disclose arises outside the warranty
9 period) (internal citation and quotation marks omitted); *Tait v. BSH Home Appliances Corp.*, ---
10 F.R.D.---, 2012 WL 6699247 (C.D. Cal. Dec. 20, 2012) (“[In] *Wilson* . . . the Ninth Circuit
11 clarified that the requirement to prove a safety hazard did not apply where the plaintiff began
12 experiencing problems . . . within the express warranty period.”) (internal quotations marks and
13 citation omitted). As noted in *Decker v. Mazda Motor of America, Inc.*, No. 11-0873, 2011 WL
14 5101705 (C.D. Cal. Oct. 24, 2011), which involved allegations of a defect that arose both during
15 and after the warranty period, “[i]t makes logical sense that the average consumer would expect the
16 manufacturer to disclose significant defects of any nature that arise within the warranty period. But
17 outside of that warranty period, the average consumer would only expect the manufacturer to
18 guarantee against unreasonable safety risks.” *Id.* at *4; *cf. Ford Motor Co.*, 749 F. Supp. 2d at 988
19 (noting that the requirement of proving either an affirmative misrepresentation or a safety hazard
20 outside of a warranty period is consistent with the California Supreme Court’s general policy that
21 “although [a] consumer should not be charged at the will of the manufacturer with bearing the risk
22 of physical injury when he buys a product on the market, the consumer nevertheless can . . . be
23 fairly charged with the risk that the product will not match his economic expectations unless the
24 manufacturer agrees that it will.”). Thus, Plaintiff may allege fraudulent omissions beyond safety-
25 related concerns if those omissions led to malfunctions during the warranty period.

26 **a. Post-Warranty Claims**

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1 As established above, Plaintiff has failed to allege that HP made affirmative
2 misrepresentations. Therefore, Plaintiff's fraudulent omission claims for failures outside the
3 warranty period are only actionable if he is able to establish some kind of safety issue. *See Ford*
4 *Motor Co.*, 749 F. Supp. 2d at 988.

5 To set forth a duty to disclose based on an unreasonable safety hazard, a plaintiff must
6 allege an instance of physical injury or a safety concern as well as a "sufficient nexus" between the
7 alleged defect and the safety issue. *See Wilson*, 668 F.3d at 1143-44. In *Wilson*, the plaintiffs
8 based a CLRA/UCL claim on their allegations that a defect in a laptop's design weakened the
9 connection between the power jack and the mother board, and that this defect caused laptops to
10 ignite and catch fire. *Id.* Although laptop ignition is a safety hazard, the plaintiffs did not allege a
11 sufficient nexus because they failed to explain how a defective power jack could cause the laptops
12 to catch fire. *Id.*

13 Here, Plaintiff alleges a similar safety hazard—that due to the insufficient power supply,
14 HP's computers were more likely to "overheat, short out, melt and catch fire, creating a significant
15 safety risk." SAC ¶ 3. However, Plaintiff does not allege that his computer or anyone else's
16 computer ever actually "caught fire." SAC ¶3. Plaintiff also does not allege that he was personally
17 injured by his computer's melting. Moreover, Plaintiff fails to set forth any facts regarding the
18 degree to which his computer melted or explain why this melting would necessarily create an
19 unreasonable safety risk. Furthermore, Plaintiff has failed to establish a sufficient nexus between
20 the alleged deficient power supplies and "catching fire" or "melting." Plaintiff claims that an
21 inadequate power supply may send "voltage surges" through the computer, and then makes a
22 hypothetical proposition that his computer was thus more likely to "catch fire." SAC ¶¶ 3, 81.
23 However, Plaintiff does not cite to any facts beyond his own hypotheticals and conjectures to show
24 a nexus between the allegedly deficient power supply, voltage surges, and fires. Such a cursory
25 reference does not establish a sufficient nexus between the alleged defect and safety hazard, and
26 does not impart HP with a duty to disclose. Therefore, the Court finds that Plaintiff fails to

1 sufficiently allege that Defendants had a duty to disclose that the computers' power supplies posed
2 safety risks.

3 Thus, the Court GRANTS with prejudice HP's Motion to Dismiss Plaintiff's CLRA, UCL,
4 and common law fraud claims that are based on Defendants' alleged post-warranty safety-based
5 fraudulent omission claims (first, third, and sixth causes of action). *See Cafasso, U.S. ex rel. v.*
6 *Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) ("[T]he district court's
7 discretion to deny leave to amend is particularly broad where plaintiff has previously amended the
8 complaint.") (internal quotation marks and citation omitted).

9 **b. Warranty Period Claims**

10 Plaintiff also claims that HP's omissions regarding the sufficiency of the power supply are
11 actionable for the failures that Plaintiff's computer experienced during the warranty period:
12 freezing, rebooting, and randomly restarting. *See Opp'n at 20-21.* As described above, omissions
13 of material facts are actionable for non-safety related malfunctions so long as the problems
14 occurred during the warranty period. Given that Plaintiff's SAC includes new factual allegations
15 regarding computer malfunctions that allegedly manifested *during* the warranty period, the Court
16 proceeds to consider Plaintiff's warranty period claims regarding fraudulent omissions.

17 Plaintiff alleges that HP deceived him by omission under all four circumstances in which a
18 duty to disclose may arise: "(1) when the defendant is the plaintiff's fiduciary; (2) when the
19 defendant has exclusive knowledge of material facts not known or reasonably accessible to the
20 plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when
21 the defendant makes partial representations that are misleading because some other material fact
22 has not been disclosed." *Collins*, 202 Cal. App. 4th at 255-56 (citing *LiMandri v. Judkins*, 52 Cal.
23 App. 4th at 336); *see Opp'n at 20* (citing SAC ¶¶65-69). However, Plaintiff does not allege a basis
24 for finding a fiduciary relationship with HP. Rather, Plaintiff alleges only that the discrepancies
25 between the capabilities of the power supply unit and the requirements of the "recommended"
26 components of his computer were "known exclusively to, and actively concealed by, Defendant,
27 not reasonably known to Plaintiff, and material at the time they were made." SAC ¶ 66.

Under the CLRA and UCL, “plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss.” *Wilson*, 668 F.3d at 1145; *see id.* at 1146 n.5 (“[T]he failure to disclose a fact that a manufacturer does not have a duty to disclose, *i.e.*, a defect of which it is not aware, does not constitute an unfair or fraudulent practice [under the UCL].”). As this Court noted in *Kowalsky v. Hewlett-Packard Co.*, No. 10-CV-02176, 2011 WL 3501715 (N.D. Cal. Aug. 10, 2011), while “the heightened pleading requirements of Rule 9(b) do not apply to allegations of knowledge, intent, or other conditions of a person’s mind, . . . [t]his does not mean . . . that conclusory allegations of knowledge or intent suffice.” (internal quotation marks and citations omitted). Rather, plaintiffs who successfully allege that a manufacturer was aware of a defect must still present at least a plausible basis for this knowledge. *See Wilson*, 668 F.3d at 1146. For example, in *Kowalsky*, this Court found that plaintiff successfully alleged that HP was aware of a defect that caused its printers to randomly skip pages when copying, scanning and faxing by alleging: (i) HP advertised that it adheres to “the recognized ISO/IEC 24734 and 24735 standards,” which “require[] multiple tests using repeated scanning of a multi-page document”; and (ii) “consumers complained of the defect ‘both in third-party fora as well as directly to HP’” three months before the plaintiff purchased his printer.” *Kowalsky*, No. 10-CV-02176, 2011 WL 3501715, at *4.

In contrast, Plaintiff’s SAC sets forth few facts to support Plaintiff’s allegations that HP knew that the computer’s power supply unit was inadequate at the time of Plaintiff’s purchase. SAC ¶¶ 1, 65, 66. At best, Plaintiff cites to recommendations by manufacturers of minimum power supplies for certain graphics cards, though does not allege that HP knew of these manufacturer recommendations at the time of sale. *See SAC ¶20*. Likewise, Plaintiff alleges that HP has a page on its website entitled “Troubleshooting Power Supply Issues,” which discusses the need for adequate power supplies. *See SAC ¶ 28*. However, this fact does not demonstrate that HP was aware that the specific customizable computers at issue in this case lacked sufficient power supplies when Plaintiff purchased the Slimline computer in June of 2010. Further, Plaintiff alleges that, at some unspecified time, one HP customer told another HP customer that “Slimline PCs are

1 not meant to be gaming PCs. The power supplies are too small and the cabinets are too small to
2 expel the heat that big gaming video cards generate.” SAC ¶ 29. This is insufficient to impute
3 knowledge on HP. *See Oestreicher*, 544 F. Supp. 2d at 974 n.9 (“Random anecdotal examples of
4 disgruntled customers posting their views on websites at an unknown time is not enough to impute
5 knowledge upon defendants. There are no allegations that Alienware knew of the customer
6 complaints at the time plaintiff bought his computer.”); *see also Baba*, 2011 WL 317650, *3
7 (finding that plaintiff’s allegations of a few complaints on the Internet were insufficient to support
8 a claim that HP engaged in corporate fraud by making misrepresentations and omissions regarding
9 a known defect”).

10 Accordingly, the Court finds that Plaintiff has not sufficiently alleged enough facts to
11 support an inference that HP knew of the power inadequacies at the time of sale. Consequently,
12 Plaintiff also has not sufficiently alleged that HP “intentionally” concealed or suppressed this
13 information. *See Mui Ho v. Toyota Motor Corp.*, --- F. Supp. 2d ---, 2013 WL 1087846, *9 (N.D.
14 Cal. 2013) (stating that, one factor for a claim for active concealment, is that “the defendant must
15 have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff”).
16 Likewise, Plaintiff has failed to sufficiently allege a common law fraudulent omission claim
17 because Plaintiff has not sufficiently alleged that HP knew of the computers’ defects and thus
18 “intentionally concealed or suppressed the fact with the intent to defraud the plaintiff.” *Id.*

19 Thus, the Court GRANTS HP’s Motion to Dismiss Plaintiff’s CLRA, UCL, and common
20 law fraud claims that are based solely on Defendants’ alleged fraudulent omissions regarding
21 malfunctions that manifested *during the warranty period* (first, third, and sixth causes of action).
22 Because Plaintiff has not previously had an opportunity to cure this deficiency and may easily do
23 so, the Court grants Plaintiff leave to amend these claims.

24 **C. Plaintiff’s Remaining UCL Claims**

25 **1. Unfair Prong of the UCL**

26 Plaintiff also alleges that Defendant’s acts and omissions were unfair and that Defendant
27 engaged in these actions in order to increase its profits. FAC ¶ 101. In *McKell v. Wash. Mut., Inc.*,

1 142 Cal. App. 4th 1457 (2006), the California Court of Appeal held that, “[a] business practice is
2 unfair within the meaning of the UCL if it violates established public policy or if it is immoral,
3 unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its
4 benefits.” *Id.* at 1473. In determining whether a business practice is unfair under this approach,
5 California courts balance the “impact on its alleged victim” against “the reasons, justifications, and
6 motives of the alleged wrongdoer.” *Id.*; *cf. Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152,
7 1169 (9th Cir. 2012) (noting that “[t]he proper definition of ‘unfair’ conduct against consumers ‘is
8 currently in flux’ among California courts,” and that some appellate court opinions have applied an
9 even more stringent test, particularly when it comes to conduct that threatens an incipient violation
10 of antitrust law).

11 The Court previously rejected this claim on the grounds that Plaintiff made only conclusory
12 statements that HP’s alleged conduct was unfair, but did not reference any established public
13 policy that HP’s actions have violated or claim that HP’s conduct is immoral, unethical,
14 oppressive, or unscrupulous. Plaintiff has not materially amended his complaint to address these
15 deficiencies. Plaintiff does contend in his Opposition, however, that “HP appears to agree that its
16 practices were improper” because “after this suit was filed, [HP] appears to have stopped offering
17 customers the option to select upgraded, power-hungry components in the models at issue in the
18 complaint.” Opp’n at 2. The Court may not consider this allegation for purposes of HP’s Motion
19 to Dismiss as it was not referenced in the SAC. *See Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th
20 Cir. 2003) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond
21 the complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a motion to
22 dismiss.”) (internal quotation marks and citation omitted). However, the Court may consider this
23 allegation in determining whether to grant leave to amend. *See id.* Because this change in HP’s
24 behavior could support Plaintiff’s UCL claim based on unfair business practices, the Court
25 GRANTS Defendant’s Motion to Dismiss this part of Plaintiff’s sixth cause of action without
26 prejudice. However, should Plaintiff seek to amend his complaint further, the Court will only
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1 permit Plaintiff to add this particular allegation to support his UCL claim based on unfairness. No
2 additional, new factual allegations will be permitted to support this claim.

3 **2. Unlawful Prong of the UCL**

4 The unlawful prong of the UCL “borrows violations of other laws and treats them as
5 unlawful practices,” which the UCL then “makes independently actionable.” *Cel-Tech Commc’ns,*
6 *Inc.*, 20 Cal. 4th at 180 (internal quotation marks and citations omitted). Plaintiff borrows
7 Defendants’ alleged breach of class members’ express warranties and violations of the CLRA,
8 FAL, and Song-Beverly Consumer Warranty Act to support his theory of liability under the
9 unlawful prong. However, an alleged breach of a warranty—a contract—is not itself an unlawful
10 act for purposes of the UCL.” *Boland, Inc. v. Rolf C. Hagen (USA) Corp.*, 685 F. Supp. 2d 1094,
11 1110 (E.D. Cal. 2010) (“Contractual duties are voluntarily undertaken by the parties to the contract,
12 not imposed by state or federal law.”) (internal quotation marks and citation omitted). Therefore,
13 “[a]n act that breaches a contract may also breach the UCL, but only when the act is unfair,
14 unlawful or fraudulent for some additional reason.” *Id.* (citing *Smith v. Wells Fargo Bank,*
15 N.A., 135 Cal. App. 4th 1463, 1483 (2005)). Because the Court finds that Plaintiff did not
16 plausibly allege any statutory violations, it concurrently finds that Plaintiff fails to plausibly allege
17 violation of the unlawful prong of the UCL. However, because the Court has afforded Plaintiff
18 leave to amend his CLRA, UCL, and common law fraud claims that are based solely on
19 Defendants’ alleged fraudulent omissions regarding malfunctions that manifested *during the*
20 *warranty period*, Plaintiff may be able to cure these deficiencies with leave to amend. Therefore,
21 the Court GRANTS Defendants’ Motion to Dismiss Plaintiff’s sixth cause of action based on the
22 unlawful prong of the UCL with leave to amend.

23 **IV. CONCLUSION**

24 For the foregoing reasons, the Court GRANTS-IN-PART and DENIES-IN-PART
25 Defendant’s Motion to Dismiss. The Court DENIES HP’s Motion to Dismiss Plaintiff’s fourth and
26 fifth causes of action based on breach of express warranty and violation of the Song-Beverly
27 Consumer Warranty Act. The Court GRANTS HP’s Motion to Dismiss Plaintiff’s first, second,
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1 third, and sixth causes of action, brought for violations of the CLRA, FAL, UCL, and common law
2 fraud. Because Plaintiff has already had an opportunity to amend his claims based on affirmative
3 misrepresentations, but has failed to do so adequately, the Court dismisses these claims with
4 prejudice. Likewise, because Plaintiff has had the opportunity to amend his safety-based omission
5 claims, but has not sufficiently cured the deficiencies identified previously, the Court dismisses
6 these claims with prejudice. However, because Plaintiff may allege facts to cure the deficiencies
7 regarding his fraudulent omissions claims that are predicated on malfunctions that manifested
8 during the warranty period, as well as his claims for unlawful and unfair conduct under the UCL,
9 these claims are denied without prejudice.

10 Should Plaintiff elect to file a Third Amended Complaint curing the deficiencies discussed
11 herein, he shall do so within 30 days of the date of this Order. Failure to meet the 30 day deadline
12 to file an amended complaint or failure to cure the deficiencies identified in this Order will result in
13 a dismissal with prejudice. Plaintiff may not add new causes of action or parties without leave of
14 the Court or stipulation of the parties pursuant to Federal Rule of Civil Procedure 15.

15 **IT IS SO ORDERED.**

16
17 Dated: June 21, 2013
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LUCY H. KOH
United States District Judge